

**MERRILLS**

**Some Aspects of Judicial  
Control over Special Legislation**

**Political Science**

**A. M.**

**1912**



THE UNIVERSITY  
OF ILLINOIS


LIBRARY

1912  
M55









Digitized by the Internet Archive  
in 2013

<http://archive.org/details/someaspectsofjud00merr>



SOME ASPECTS OF JUDICIAL CONTROL OVER  
SPECIAL LEGISLATION

BY

FREDERICK EMERSON MERRILLS  
A. B. Harvard University, 1911

THESIS

Submitted in Partial Fulfillment of the Requirements for the

Degree of

MASTER OF ARTS

IN POLITICAL SCIENCE

IN

THE GRADUATE SCHOOL

OF THE

UNIVERSITY OF ILLINOIS

1912



1912  
M55



UNIVERSITY OF ILLINOIS  
THE GRADUATE SCHOOL

May 28 1912

I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

*Frederick E. Merrill*

ENTITLED *Some aspects of judicial  
Control over special legislation*

BE ACCEPTED AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

DEGREE OF *Master of arts*

*W. D. Dodd*

In Charge of Major Work

*John A. Fairlie*

Head of Department

Recommendation concurred in:

*J. M. Mathews*

Committee

on

Final Examination







## BIBLIOGRAPHY.

- |                  |   |
|------------------|---|
| Cooley, T. M.    | Constitutional Limitations<br>7th. Boston, 1903.  |
| White, T. R.     | Commentaries on the Constitution of Penn-<br>sylvania. Philadelphia, 1907.  |
| Sanderson, J. F. | The Validity of Statutes in Pennsylvania.<br>Philadelphia, 1898.  |
| Binney C. C.     | Restrictions upon Local and Special Leg-<br>islation in State Constitutions.<br>Philadelphia, 1894.   |
| Goodnow, F. J.   | Municipal Home Rule. New York, 1897.  |
| Stimson, F. J.   | The Law of the Federal and State Con-<br>stitutions of the United States. Boston 1908   |
| Thorpe, F. N.    | Federal and State Constitutions, Colonial<br>Charters and Other Organic Laws. <sup>7 vols.</sup> Washington 1909<br>Proceedings and Debates of the Constitutional<br>Convention of the State of Michigan.<br>Lansing, 1907.<br>State Court Reports. |







TABLE OF CONTENTS.

Legislative discretion in passing special laws where general laws might have been made applicable. p.- 5.

Legislative discretion as to sufficiency of notice of intention to apply for local and special legislation. p. - 17

Constitutional provisions granting to the courts the power of determining finally whether or not a general law could have been made applicable. p. - 21.

Conclusion. p. - 38.







The broad underlying principle followed by the courts in construing the state constitutions is that such instruments are limitations upon legislative power. In other words the people speaking through the organic law have granted to legislative bodies the power to enact laws in all cases which have not otherwise been specifically provided for by the language of the constitution. In general the legislature has power to pass laws on all political and governmental matters except those over which the executive and judicial departments have been granted control by constitutional authority, and except in those cases where legislation has been expressly forbidden or where legislation would violate some right, which by custom and immemorial usage has remained inherent in the people.

Because the theory of the supremacy of the English Parliament found foothold in this country, our legislative bodies were primarily supreme also. Before the decision in *Marbury v. Madison* ( 1.) it was an open question whether or not the Supreme Court of the United States could declare a legislative act void, for the Constitution did not specifically grant the Court any such power. Furthermore the powers vested in Congress as well as those vested in the Executive Department were theoretically co-ordinate and not inferior to the powers vested in the Courts. The legislative body by the very fact that they



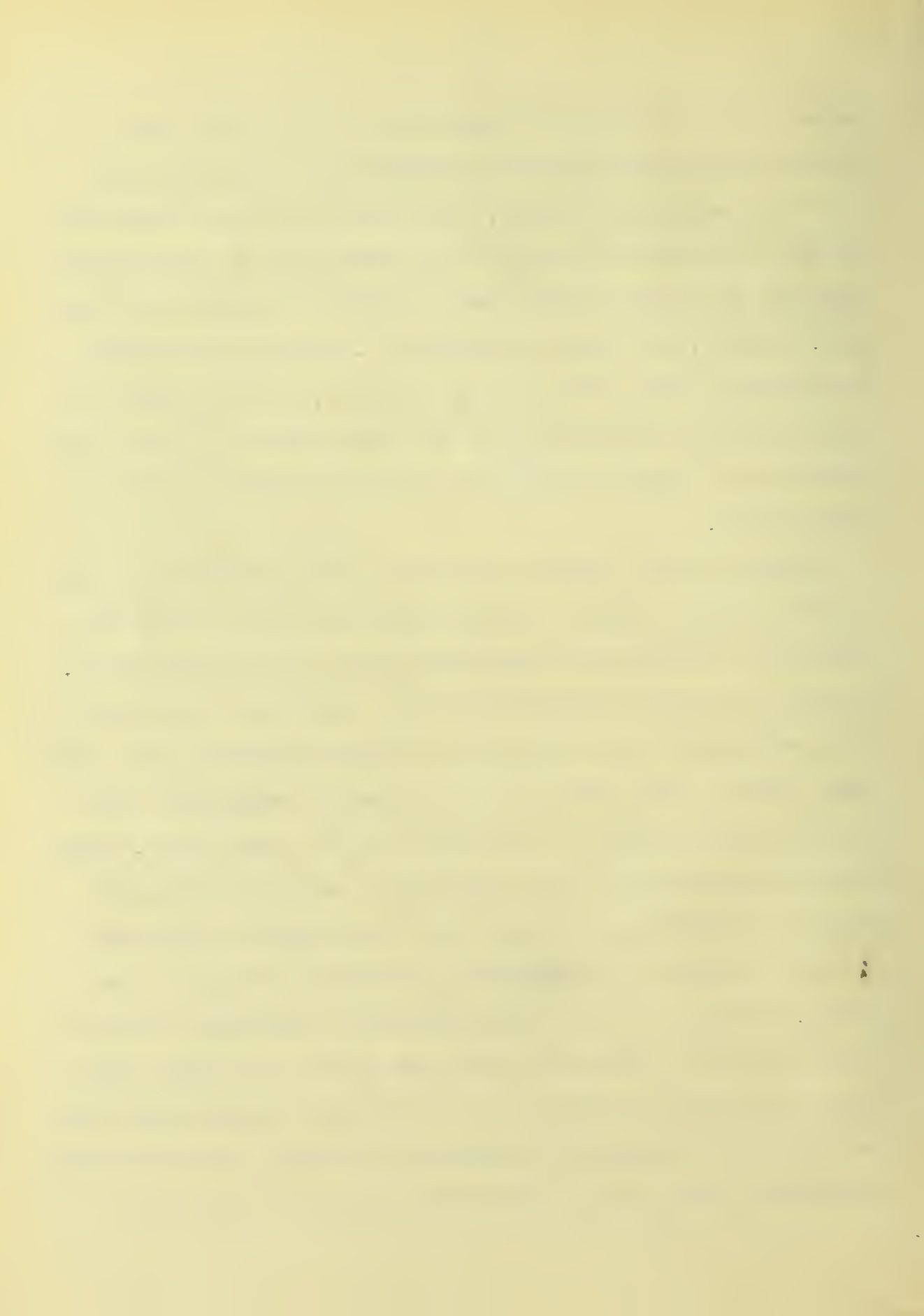




passed an act raised the presumption that they, who were in the best position to examine and judge the facts requiring a certain legislative remedy, had found such an act necessary and not in violation of any of the provisions in the document they had all sworn in their oath of office to uphold and protect. However, the Court, in Marbury v. Madison established the principle that public policy demanded, and the framers of the Constitution intended that the courts were to be the final arbiters as to whether or not an act was in violation of the Constitution.

Owing to this earlier conception of the supremacy of legislative power, colonial charters and the earlier state Constitutions contained few limitations upon their legislatures. The relation between these legislative bodies and the people they represented was very close, and persons desiring some privilege, usually one connected with corporate enterprise, secured this privilege by a special act of the legislature. These acts were necessarily local and special in their nature, yet in that period of our constitutional development such grants of privilege were not ordinarily considered vicious or dangerous. However, with national industrial growth and the concentration of the population in large cities, the great differentiation in the local needs of municipal corporations, and the desire for economic betterment on the part of enterprising individuals, soon made the defective features of local and







special legislation apparent.

"What may be called the science of legislation - the careful adaptation of laws both to the needs of the state and the various classes of people composing it, and to the body of law already in existence, the determination of the proper scope of general laws, and of the circumstances which call for legislation of a local or special character was too little regarded, and as time went on, not only was the volume of special and local legislation needlessly increased, such acts being frequently passed as to matters that could have been provided for under a general system, but private schemes were often pushed through the legislatures by unscrupulous men, to the sacrifice of public interests, each separate locality was liable to unwise interference in its affairs, and distracting changes of its governmental system, and the law as to many matters was thrown into confusion." (1.)

Because of the obvious inadequacy of granting privileges by special act of the legislature, by the beginning of the fifties a certain well defined constitutional provision, entirely devoted to the enumeration of certain cases in which the legislature was prohibited from passing any local or special laws, had appeared. Of the State Constitutions now in force that of New Jersey in 1844 was the first to provide such a section. (2.) In this instrument there are ten specific cases in which special and local legislation is prohibited. Some of

1. Binney<sup>S.C.</sup> "Restrictions Upon Local and Special Legislation." p.6

2. Art. IV - Sec. VII - 1, 2, 7, 11.







4.

the prohibitions are; the granting of divorces; laying out highways; selecting juries; regulating the internal affairs of towns and counties; increasing the fees of any public officer; changing the law of descent; and granting exclusive privileges to corporations.

The Supreme Court of Indiana speaking of a similar provision adopted by that State in 1851 said that the object of this provision "was to restore the State from being a coterie of small independencies, with a body of local laws like so many counties palatine, to what she should be and was intended to be, a unity, governed throughout her borders on all subjects of common interest by the same laws, general and uniform in their operation." ( 1.)

In the debates of the Kentucky Constitutional Convention of 1890, Mr. Carroll spoke in favor of the adoption of a similar section for that State.

"It is a well known fact," he said, "that one of the prime causes for the calling of this convention was the abuses practiced by the Legislative Department of this State; and I venture the assertion that except for the vicious legislation and the local and special laws of all kinds and character passed by the legislatures that have met in Kentucky for the past twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky". (2)

1. Maize v. State - 4 Ind. 342

2. Kentucky Const. Con. Debates 1890 I-1419.

As quoted in Beard - "Readings on American Government." p445







# LEGISLATIVE DISCRETION IN PASSING SPECIAL LAWS WHERE GENERAL LAWS MIGHT HAVE BEEN MADE APPLICABLE.

Now practically every state in the Union has a section of specific prohibitions against special and local legislation. (1) All of the states except five, having a section of specific prohibitions, have also a concluding clause which provides in effect that the legislature shall in all other cases pass no special or local law where a general law can be made applicable. (2) The language of this concluding prohibition may at first blush appear perfectly clear. However, the question arises, "Who is to determine whether or not a special or local law was necessary and that a general law could not have been made applicable in a given case? Of course in case the legislature passes an act which is special or local and violates some specific prohibition in the constitution the courts will hold such act void. ( 3.) But when a special act is passed that is not contrary to any one of the specific prohibitions may the courts step in and say, that a general law could have been made applicable to this situation, and by such a decision substitute their discretion for that of the legislature, or does the language of the provision mean that the question as to whether or not a general law could have been made applicable, <sup>is left</sup> ~~leave this question~~ to the discretion and judgment of the legislature alone?

This question of who shall <sup>determine</sup> whether or not a special law was necessary in a given case and that a general law could not have been made applicable does not arise in some states for the reason that this concluding clause provides in effect that the legislature shall pass general laws in the enumerated







## FOOT-NOTE:--

New Jersey	1844	IV-VII
Indiana	1 85I	IV-23
Iowa	1857	III-30
Oregon	1857	IV -23
Kansas	1859	II-17 and amendment of 1906
Nevada	1864	I-21
Missouri	1865	IV-27 and amendment of 1875.
Illinois	1870	IV-22
Maryland	1867	III-33 ( Requires legislature to pass general laws where they can be made applicable.
West Virginia	1872	IV-39
Pennsylvania	1873	III-7
Arkansas	1874	V-25
Nebraska	1875	III-15
Alabama	1875	IV-23 Constitution of 1901. IV-105
Colorado	1876	V-25
Georgia	1877	I-4-i (where a general law has been made applicable no special act to be passed.
Texas	1876	III--56
California	1879	IV-25
Montana	1889	V-26
North Dakota	1889	II-70
South Dakota	1889	III-23
Wyoming	1889	III-27
Idaho	1889	II-19
Washington	1889	I-29
Kentucky	1890	59-29
Mississippi	1890	59-28 & 29







## FOOT-NOTE CONT'D.:-

Wisconsin	(1848)	By amendments of 1871 and 1892.
South Carolina	1895	III-34-xi
New York	1894	III-18
Utah	1895	VI-26
Oklahoma	1907	V-59
Michigan	1908	V-30
Minnesota	1892	IX-33
Louisiana	1898	48
Virginia	1902	IV-64

(2.)

In Oregon, Washington, Pennsylvania, Idaho and North Carolina there are no provisions requiring that "in all other cases where a general law can be made applicable no special act shall be passed". In a few other states there is some differentiation in this provision which has been or will be indicated elsewhere.

(3.)

Knopf v. People, 185 Ill. 20

State v. DesMoines 96 Iowa 521.

State v. County Court 50 Mo. 350.







cases and in all other cases which in its judgment may be provided for by general laws. (1) This phraseology makes it absolutely clear that if the legislature passes a special or local law where a general law might have been made applicable, the very passage of the act in question is conclusive proof that in its judgment the legislature thought a general act could not be made applicable, and the constitution makes the judgment of the legislature final. The Mississippi provision is unique in the forcible language used to leave no doubt that the question is conclusively for the legislature to determine. It provides "that in all other cases where a general law can be made applicable and would be advantageous, no special law shall be enacted" and that, "If a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section ( the specific prohibitions ) the courts shall not, because of its local, special or private character refuse to enforce it." (2)

So where the language of the Constitution has expressly left the question of the applicability of a general law to legislative judgment no difficulty has arisen. In the other states, however, the doubt created by the phraseology of the provision has given rise to some conflict of authority in its interpretation. The weight of authority has been to construe this section as though it specifically made it a question of

1. New Jersey 1844, IV-VII -11. Va. 1902 IV- 64.

New York 1894, III - 18. Miss. 1890, IV - 87

2. Miss. 1890, IV - 87.







legislative judgment to decide whether a general law could have been made applicable to the case for which the special act was passed, and that the determination of the legislature that a special or local statute was necessary, is final and conclusive. Since the clause does not provide for a judicial review of legislative discretion, it is usually held that the courts can not declare the act of a co-ordinate branch of the government void, purely because the court may think that a general law could have been made applicable and that a special act was not necessary to accomplish the purpose of the legislature.

In one of the earliest cases involving this point the Supreme Court of Kansas said: "We imagine this section of the Constitution as leaving a discretion to the Legislature----. The Legislature must necessarily determine whether their purpose can or can not be expediently accomplished by a general law. Their discretion and sense of duty are the chief if not the only securities of the public for an intelligent compliance with that section of the Constitution." (1.)

This view has subsequently been taken by other states where this provision is found in their constitutions. The Illinois Supreme Court has said: "The general clause at the end of the section that 'where a general law can be made applicable no special law shall be enacted', addresses itself to the General Assembly alone. When that body has concluded a special law is necessary, except in the cases expressly provided for, it is for the General Assembly to enact it." (2.)

1. State v. Hitchcock , 1862- 1 Kan. 178.







## NOTE:-

The Courts have held the applicability of a general law and the necessity for a special law a legislative question in the following cases:-

Boyd v. Bryant	35 Ark. 69
Little Rock v. Parish	36" 166
Brown v. Denver	7 Colo. 305.
Darrow v. People	8 Colo. 426
Bell v. Maish	137 Ind 226
Mc Clelland v. State	142 Ind. 428
Francis v. Atchison & Topeka R.R.	19 Kan. 303
Witchita v. Burleigh	36 Kan. 34
Davis v. Gaines	48 Ark. 370
Carson v. St. Francis Levve Dist.	59 Ark. 513
Owners of Land v. People	113 Ill. 296
Wilson v. Board of Trustees	133 Ill. 443
Gentile v. State	29 Ind. 409
State v. Tucker	46 Ind 355
Vickery v. Chase	50 Ind. 461
Evansville v. State	118 Ind. 426
State v. Kolsem	130 Ind. 434
Oklahoma City v. Shields	100 Pac. 576
Smith v. Grayson County	44 S.W. 921 (Tex)
Leedy v. Brown	27 Okla. 439







hibited, its conclusion is not the subject of judicial review."(1.

Although by weight of authority the applicability of a general law is a legislative question, there is an exceedingly strong presumption that in Indiana, which was the first state to adopt this clause, ~~that~~ the framers of the Constitution intended that the courts should have the power of reviewing legislative action in cases where a general law might have been made applicable. Indiana adopted this provision in 1851 and it seems to be based upon the New Jersey provision of 1844, ~~and~~ In substance, <sup>it</sup> is identical with the provision of that state with the important exception that the phrase "in the judgment of the legislature" does not appear in the Indiana provision. The very omission of this phrase on the part of the framers of the Indiana Constitution raises a strong implication that the Convention hoped and intended that the courts should construe this clause as giving them power to review legislative discretion in such cases.

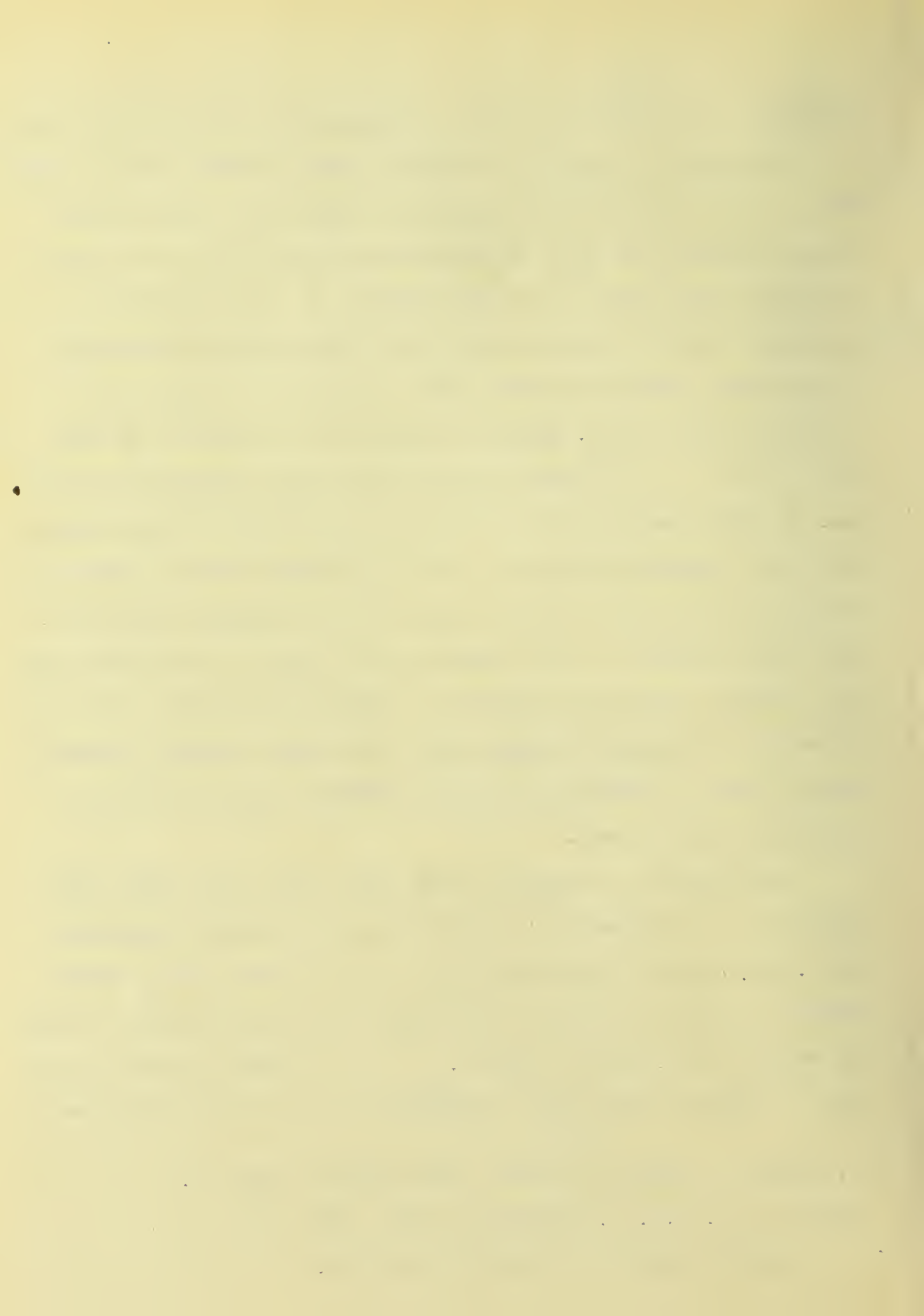
Furthermore the earlier <sup>Indiana</sup> cases held that "The maxim 'that parliament is omnipotent' has no place in American jurisprudence. Whether the legislature has, in the case at bar, acted within the scope of their authority, is in our opinion, a proper subject of judicial inquiry." ( 1.) In fact not until 1891 did it become settled that the judgment of the legislature was

1. Thomas v. Board of Comrs. Clay County 5 Ind. 4.

Also: M. & I. R.R. v. Whiteneck 8 Ind. 219, 229.

Jasper County v. Spitler 13 Ind 238.







conclusive in cases of special and local legislation where a general law might have been made applicable. (1.)

Though by weight of authority it is held that the judgment of the legislature that a general law would not be applicable is final and conclusive, in a few states the law on this point is in a somewhat unsettled condition. In California the Court by way of dictum has said that "The Constitution submits the question whether a general law can be made applicable in any given case to the judgment of the legislature to be determined in the light of the evils to be avoided, and with its determination upon that question we may not interfere unless the disregard of the Constitutional requirement is clear and palpable." ( 2.) "We would not overthrow an act of a co-ordinate branch of the government under this provision unless it clearly appears that a general law could be made applicable." (3)

As early as 1871 the Nevada Court similarly said:

"Primarily the legislature must decide whether or not in a given case a general law can be made applicable. That decision may be reviewed and upheld or reversed by the Courts, but presumptively the decision of the legislature is correct." "For this Court to oppose its judgment to that of the legislature, excepting in a case admitting of no reasonable doubt, would not only be contrary to all well considered precedents, but would be a usurpation of legislative functions. It can not be denied

(1) State ex. rel. v. Kolsem 130 Ind. 434.

2. People v. Mullender 132 Cal. 217.

3. People v. Levee District No. 6. 131 Cal. 30.







that the tendency in some states of this Union is that way, undoubtedly from good motives; but the sooner the people learn that every act of the legislature not found to be in clear, palpable and direct conflict with the written constitution must be sustained by the courts, the sooner they will apply the proper correction to unjust or impolitic legislation, in the more careful selection of the members of that branch of the State government to which they have delegated and in which they have vested the legislative authority of this state." ( 1.)

Although the California and Nevada Courts have not held any legislation void as being <sup>α</sup>special or local law where a general law might be made applicable, nevertheless they have stated that they do not consider the discretion of the legislature conclusive and binding upon this point. It would appear from the dicta of these courts that they wish to reserve the right of declaring some act special or local where a general law might be made applicable in order to meet some emergency that might arise.

In a rather curious way, the Supreme Court of Kentucky, though not <sup>conclusively deciding</sup> perhaps, whether a legislative determination that a general law could not be made applicable was final or not, has held an act prohibiting barbers from doing business on Sunday, void as a special law where a general law could have

1. Hess v. Pegg, 1871. 7 Nev. 23. - Also State v. Clark 3 Nev 323  
Evans v. Job 8 Nev. 323; Rosenstock v. Swift 11 Nev. 129

Quilci v. Stosnider ( Nev. 1911 ) 115 Pac. 177







been made applicable. ( 1.) The Court in this case closely followed a decision made to the same effect in Missouri in regard to a similar statute. The Kentucky Court did not observe that in Missouri the Constitution specifically provides that the Courts and not the legislature shall be the judges as to whether or not a general law could have been made applicable, while the Kentucky Constitution does not state who shall finally determine this question. If the act in question was really a special law within the scope of the evils which such sections prohibiting local and special legislation intended to prevent, the Kentucky Court might have properly followed the weight of authority in determining this question. (2.)

Until a recent case ( 1907 ) the South Carolina Courts have held that whether or not a general law could have been made applicable to the situation for which the legislature deemed a special act necessary was a judicial question. "There is much authority, " the Court has said, "for the view that under the provision prohibiting the legislature from passing a special law where a general law could have been made applicable, it belongs to the legislature and not the judicial department to determine whether a general law can be made applicable. We incline, however, to the view that in this state it must be held a judicial question to determine when a general law can be made applicable, since under Art.1 - 29 of the Constitution,

1.Stratman v. C'mth. 125 S.W. 1094.

Missouri case followed:- State v. Granemann 132 Mo. 326.

Missouri Povision:- Const. 1875, VI - 27.







it is ordained that the provision of the Constitution shall be construed to be mandatory and prohibitory and not merely directory or permissive by its own terms." ( 1.)

A recent case held that the question of finally determining the necessity for a special law where a general one might have been made applicable was exclusively for the legislature, but though this decision was over-ruled in 1910, the law is perhaps somewhat unsettled. ( 2.) At any rate even though the Constitution of South Carolina does provide that the provisions of that instrument shall be mandatory, it is not quite clear why, that in a case where there may well be a reasonable difference of opinion, the mandatory clause will give the courts power to say that a general law could have been made applicable(3)

1. Carolina Grocery Co. v. Burnet ( 1901) 61 S.C. 205.

Followed:- State v. Brock 66 S.C. 357; Burnet v. Israel 61 S.C. 215

Cm'r. v. Buckley 82 S.C. 357

2. Buist v. City Council 77 S.C. 273 ( 1907 ). In this case-  
Opinion by Gary, J. - it was held that the question was for the legislature exclusively, Jones, C.J. dissenting.

In Barfield v. Stevens Mercantile Co. 67 S.E. 158.-1910-  
opinion by Jones, C.J. - it was held that the question was judicial, following former decisions. Gary, J. dissenting. Perhaps with a slight change in the personnel of the Court, the law might become definitely settled.







## FOOT-NOTE - 3-

North Dakota, I-21, California, I-22, Washington, I-29, Montana, III-29, Utah I-26, South Carolina I-29, have mandatory clauses requiring that the provisions of the Constitution shall be construed to be mandatory and not merely directory, unless so otherwise provided. None of these states, except South Carolina, have gone far enough to indicate that this clause either specifically or impliedly grants to the courts the power to review a legislative decision that a general law could not have been made applicable and a special act was necessary. It is ordinarily a well settled rule of Constitutional law that the provisions of a constitution are to be taken as mandatory unless it expressly appears, or is necessarily implied from the instrument, that some provision is merely intended to be directory. In State ex. rel. Reed v. Jones 6 Wash. 452, it was held that although the mandatory clause is addressed to the several to the several departments, one department can not coerce another into obedience to the mandatory provision.

While the California Court has never gone so far as to declare a law special and that a general law would be applicable the Court has frequently intimated that there are cases where the court might step in and interfere. Whether this attitude is because of the mandatory clause it is impossible to say.







# LEGISLATIVE DISCRETION AS TO SUFFICIENCY OF NOTICE OF INTENTION TO APPLY FOR LOCAL AND SPECIAL LEGISLATION.

A discussion of the various provisions prohibiting special legislation and <sup>as to</sup> what power of review the courts have under such sections necessarily raises the question of what construction the courts put upon a provision requiring that no special law shall be passed unless notice of intention to apply for such legislation shall have been published in the locality to be affected a certain length of time before the passage of the proposed measure. In other words if the legislature finds that a special act is desirable, which is not prohibited in the section of enumerated cases, such act can not be passed until notice of intention to apply therefor shall have been published beforehand. This provision requiring notice only applies to unenumerated cases for in the specific cases a special law can not be passed under any circumstances, and be given the effect of law.

In those states which have this provision requiring notice (1 the question arises who is to determine finally whether such notice is sufficient- the legislature or the courts?. By weight of authority, whether or not proof of publication of notice has been properly established in the legislature before the passage of the special act, is conclusively a question for the legislature. The very passage of a local or special act by that body is accepted as final evidence that the constitutional requirements have been complied with.

1. New Jersey 1844, VI - VII-9; Ala. 1901, IV-106; Mo. 1875, IV-54  
N. Car. 1876, II-12; Ark. 1874, V-26; Fla. 1885, III-21.







In regard to this point the Supreme Court of Florida has said: "The obligation resting upon the legislative department of the government to conform to the <sup>e</sup>quirements of this provision of the Constitution, and to the staute law enforcing the same, can not be questioned. No local or special bill, within the purview of the proviso of this section of the organic law should be passed, except and until notice of the intention to apply for the passage of the same has been given in the manner contemplated by the Constitution, and authorized legislation thereunder; not is it even presumed that any branch of the legislative department will give its sanction to any such local or special legislation until legal and satisfactory evidence that such notice has been published shall be 'established in the Legislature'. This feature of the fundamental law is as binding upon the consciences of those intrusted with the legislative function of the government as ~~is~~ any other~~f~~ part of the Constitution, but this truth is by no means conclusive that power has been given to the judiciary to sit in judgment upon a co-ordinate branch of the government. No such power has been given to the judiciary. To decide whether or not the notice has been given is a legislative function, not only in its nature, but as a result of the provision that 'the evidence that such notice has been published shall be established in the legislature before such bill shall be passed.' which provision as excluding any interference in the matter by the judiciary, supplements the inhibition pronounced by the secod article of the Constitution, that no







person properly belonging to one of the departments of the government shall exercise any powers appertaining to either of the others except in cases expressly provided for by that instrument". (1.)

In Pennsylvania the discretion of the legislature in deciding whether or not the constitutional provision requiring notice of intention to apply for a special law <sup>has been complied with</sup> is not always conclusive because of the mere passage of the act in question. In Perkins v. Philadelphia (2.) it was stated that if the law had been properly certified by the General Assembly and approved by the Governor, the presumption that the proper proof of notice had been exhibited was conclusive, and the question could not be inquired into by the Court. In Chalfant v. Edwards(3) it was admitted that no proper notice was given and the law was declared invalid for that reason.

"It thus appears that while failure to give notice, if admitted on the record, will invalidate the law, yet when there is no such admission and the law is properly certified, the presumption is conclusive that due notice was given and the Court will not inquire into it." ( 4.)

1. Stockton v. Powell-1892- 29 Fla. 1. See also - Brodnax v. Groom 64 N.C. 244; Waterman v. Hawkins 75 Ark 120; Whited v. Lewis 25 La. 568; St. Louis & S.W. R.R. v. State ( Ark. 1911 ) 134 S.W. 970.

2. 156 Pa. 554- 1893; 3. 173 Pa. 246.

4. White Commentaries on Const. Pa. pp. 263 - 264.







The attitude assumed by the Pennsylvania Court seems to be more reasonable than that of the weight of authority. In most states no matter how flagrantly the provision requiring publication of notice has been violated, the courts hold that the presumption that the legislature has acted within the constitutional provision is conclusive. The object of the provision requiring notice of intention to apply for a special act, by publication in the locality to be affected, was to arouse public opinion in order that the bill might be attacked if it were vicious, and the legislature induced to defeat it. If, however, the legislature may openly disregard the provision requiring publication, this safe-guard is of no value. The passage of the bill ought be no more than a strong presumption that the law requiring publication has been complied with, a presumption that may be over-turned if the record shows that notice was not given or that the law has been violated.

In Missouri the question as to whether or not the legislature has complied with the provision requiring notice of intention to apply for a special or local act, has, in a not clearly defined case, been held subject to judicial review. ( 1.) It was held that it was for the Court to determine finally whether or not the provision had been complied with, and that the provision was mandatory upon the legislature. Why the provision is mandatory and if so why it is the function of the

1. State ex. rel. v. Yancy 123 Mo. 391.







Court to substitute their discretion for that of the legislature does not appear in the decision. Perhaps this attitude was taken for the reason that the Constitution of Missouri grants to the courts the power of reviewing a legislative act when such is special or local in character and it would appear that a general law might have been made applicable.

CONSTITUTIONAL PROVISIONS GRANTING TO THE COURTS THE POWER  
OF DETERMINING FINALLY WHETHER OR NOT A GENERAL LAW COULD  
HAVE BEEN MADE APPLICABLE.

The clause providing "that in all other cases no special act shall be passed where a general law can be made applicable", interpreted by the courts as leaving the question of whether or not the necessity for a special act existed, entirely to the legislature, evidently did not work out satisfactorily in some states. In Missouri this provision had been in effect but ten years when it was radically changed by a constitutional amendment providing that whether or not a general law could have been made applicable was a question for the courts to determine, without regard to any legislative assertion on the subject. ( 1.) Since 1875 when the Convention of Missouri adopted this provision, similar clauses have been adopted

1. Missouri- 1875- 1V-53. See Com'rs. v. Shields, 62 Mo. 247.







in Minnesota, Alabama, Kansas and Michigan. ( 1.)

Even this provision is not designed to abolish all special and local legislation. Constitutional conventions usually recognize the necessity for some local and special laws and have only prohibited them in cases where a general law would have provided the remedy sought, <sup>and</sup> in the unenumerated cases. This provision only intends that the discretion of the legislature in determining the necessity for a special act shall be subject to judicial review; that if in the opinion of the court the result or remedy desired could have been secured under a general scheme of legislation, a special act to this end will be void, in spite of any legislative assertion to the contrary. Under the provision which prohibited simply a special law where a general law might be made applicable, the courts ordinarily refused to interfere no matter how vicious this special act might be. Thus a constitutional provision giving the courts power of review over a legislative discretion formerly absolute, may prove valuable in an emergency. When the Michigan Constitutional Convention of 1907 was considering this clause providing for judicial control, Mr. Campbell said:

"The object of this amendment is to prevent the legis-

1. Minn. Amend. 1892, IV-33. Kansas 1906, II-17.

Michigan 1908, V-30.

Ala. 1901, IV-105 - provides that in all cases where a general law has been made applicable no special act shall be passed, and that the courts are to be the final judges as to whether or not such special act was necessary.







lature either upon petition of a per centage of the electors, or by action of themselves, declaring that a special law is necessary; that a general act can not be passed covering the subject. It is a provision found in the Constitution of Minnesota and I think it is a good one. In other states it has been found that the attempts to limit the action of the legislature upon the passage of special legislation has been easily avoided; cases are on record where the legislature wanting to pass an act that applied to only one city in the state would pass an act to apply to cities having a population, say of 25,000 and not exceeding 25,100. Now it seems to me that if it is made a judicial question, if the courts shall determine whether or not a special law is necessary, such attempts to get around the constitutional provision would be avoided. " ( 1.)

Owing to the fact that this provision has been in operation in Michigan only a short time, it is necessary to inquire into the experience of other states in order to determine what effect it has had.

The Alabama Constitution provides merely that no special law shall be passed where a general law has been made applicable, and that whether or not a general law has been made applicable is declared to be a judicial question. ( 2.) This limits the power of the courts to declare special or local laws, not specifically prohibited, void, to a very small number of cases. Nevertheless the courts of this state have had several

1. Michigan Constitutional Convention Debates. Vol. I-462.

2. Const. 1901, IV-105.







cases under consideration in which they declared acts providing for the refunding of the bonded indebtedness of certain particular localities void on the ground that a general law was in existence which provided for the refunding of the bonded indebtedness of localities. ( 1.) In the first of these cases the Court said: "It is apparent that the subject matter of the two act<sup>s</sup> is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the local or special law--- if, the insertion of such matters in special, local, or private law would obviate the constitutional prohibition, then the prohibition could be easily circumvented and practically rendered nugatory." ( 1.)<sup>a</sup>

In a later case the Court said: "If, therefore, the issue of the bonds by St. Clair County was provided for by the general law, approved February 26, 1903, the legislature was forbidden to pass the act approved September 26, 1903, and the Courts and not the legislature, are to determine that question". (1b)

Leaving to the courts the power of determining finally whether or not a general law could have been made applicable seems to have had a wholesome effect in Kansas. This provision has been treated by the Kansas Courts as granting a definite and specific power to the judicial department, and not a general control over a wide field of legislation which they may attack

1. - 1a City of Montgomery v. Reese (1906) 149 Ala. 138.

1b. Forman v. Hair 150 Ala. 539







and hold void under an extended interpretation of this provision when other means of holding the law void have failed. In a recent case ( 1.) an act creating a separate Court for the City of Canute was held void as being a local law where a general act could have provided adequate remedy. Canute is some distance from the county seat and being a city of about 15,000 people, a municipal court was thought both desirable and necessary. The Court did not object to the City having such a court but the act was nevertheless held void because a general law offering like facilities to other cities similarly circumstanced could have been made applicable to the situation. This decision indicates the possibilities of reform. The courts may by this check make it plain both to the legislatures and the people that if localities desire additional machinery, the proper method of obtaining it is to induce the legislature to provide for it under a general legislative scheme, so that other localities in a similar situation <sup>may</sup> have the option of accepting or rejecting the advantages offered them under such a general act, as they may see fit. ( 2.)

The Court in Kansas has put a rather strict construction upon this provision, yet a construction elastic enough to allow them to extend the constitutional provision to cases well within the spirit of the kind of legislation the provision intended to check. In 1911 the Court applied this provision

1. State v. Nation 78 Kan. 394.

2. See also:- Gardner v. State 95 Pac. 588

Deng v. Lamb 95 Pac. 592 ; Stephens v. Com'rs. 98 Pac. 790.







to a somewhat unusual state of facts. A statute of 1899 provided that probate judges divide with the county all the fees they collected in excess of \$3,000 a year. In 1901 the legislature passed a special law relating to Wyandotte County, which took the probate judge of this County out of the operation of the general law of 1899. This law was passed at the time when, under the interpretation of the constitutional provision then in force, the legislature was the conclusive judge of the applicability of a general law. In 1909 the legislature passed another act which repealed the special law of 1901 and put Wyandotte under the operation of the general law of 1899. Under this state of facts, the state, on the relation of the Attorney General, petitioned for a mandamus against Prather the Probate Judge of Wyandotte County, requiring him to make a report of the fees collected by him as such probate judge. Prather claimed that the act of 1909, repealing the special law of 1901 was a special law where a general law could have been made applicable. The Court said:

" A more serious question is whether the act of 1909 violates the constitutional provision forbidding the enactment of a special law where a general one can be made applicable. It is obviously in a sense special legislation relating to a subject capable of regulation by a general law. But it was enacted under peculiar circumstances. There was in force at the time a general statute regulating the compensation of county officers according to population, and a few special statutes taking particular counties out of the rule so established.







These special statutes were valid because they were passed while the Legislature had the power to determine finally whether a general law could be made applicable to the subject- a power that was transferred to the courts in 1906 by constitutional amendment. The new act was not within the reason or spirit of the rule against special legislation. The mischief against which the prohibition is directed had already been done. The special acts had already been passed. Several counties had already been taken out of the general rule. The latter enactment tended to remedy the existing evil, to reduce the number of counties governed by special acts, to take Wyandotte County out of the list of exceptional cases, and subject it to the operation of the general law. " ( 1.)

It might be suggested that the Court in this case could have properly found the act special on the ground that the act repealing the special law of 1901 should have placed all counties under the operation of the general law of 1899, rather than Wyandotte County alone. Though correct in theory this objection is somewhat factitious in this case. Under the facts the attitude of the Court was at least in accord with public policy, if not within the most strict construction of the Constitutional provision. It seems perfectly consistent with

1. State v. Prather 112 Pac. 829; 84 Kan. 169 ( 1911)





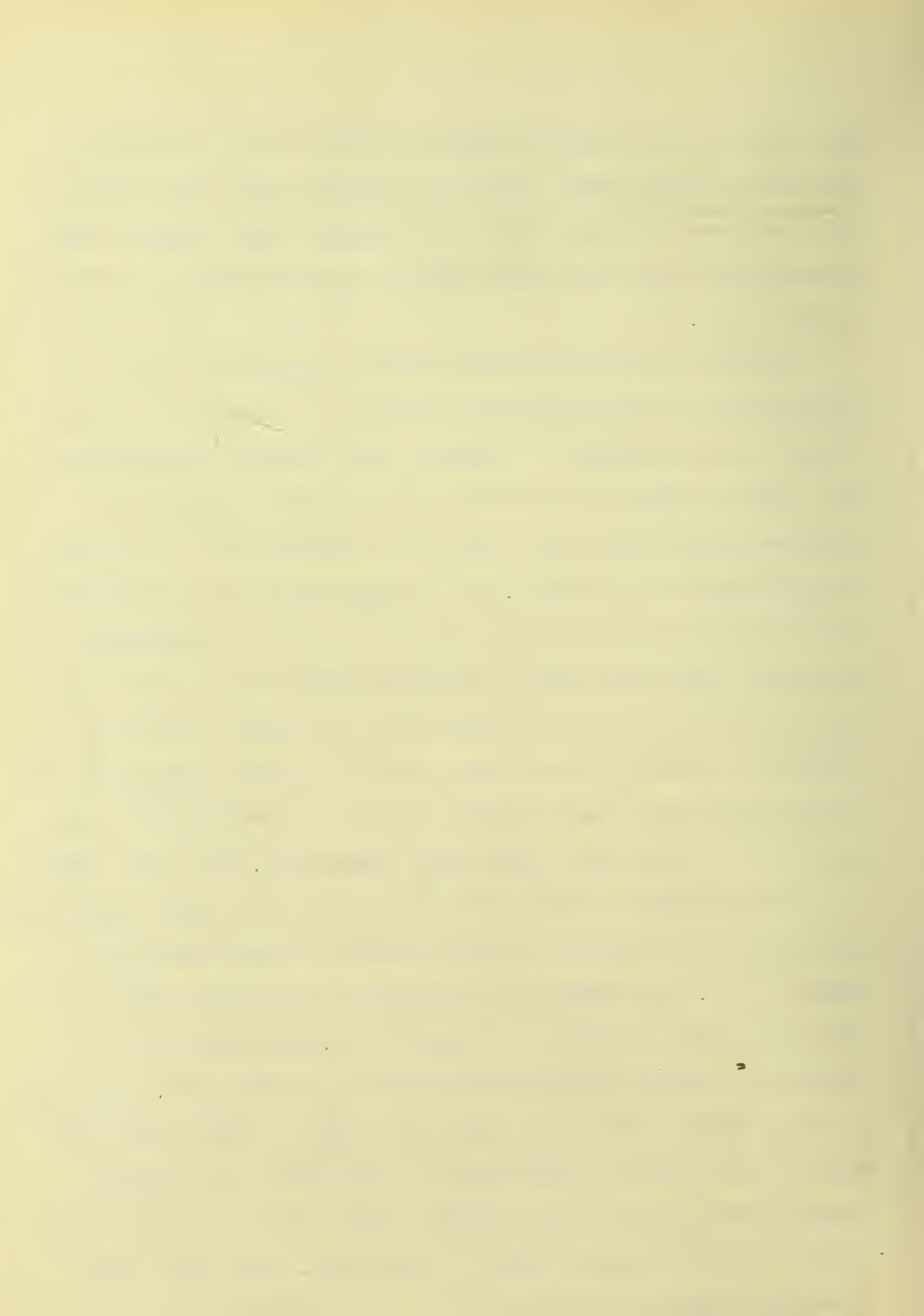


the spirit of the Kansas amendment of 1906, for the Court to take the attitude that they will look with favor upon special <sup>repealing, special acts</sup> acts that were passed before the amendment was adopted, provided such special acts shall tend to place localities under general laws.

Though the Missouri courts have not confined their interpretation of this provision entirely to the kind of legislation it was intended to prevent, yet like the Kansas courts they have in clear cases of local and special legislation declared legislative acts void, and by proper use of the provision made way for reform. In a leading case an act providing that in all cities which now have or may have, a population of 300,000 or more, the judge of probate shall receive such compensation as is now or may hereafter be provided by law to be paid to judges of the circuit courts in such cities, out of the city treasury, was attacked as being a special act where a general act could have been made applicable. The Court said:

"In this case could a general law have been made applicable? The Constitution makes the determination of this question a judicial one. But counsel for defendant city admit that a general law could have been made applicable. The admission, however, is wholly superfluous since it is very plain that such a law could have been made applicable, and the very best evidence of this fact is furnished by the general law already quoted, which stood on our statute books for twenty years, relating to every probate judge in the state. This court has constantly upheld the prohibition of the Constitution now







under consideration and ---- has condemned as local or special all legislation where a general law could have been made applicable. But the assertion is made that cases have been decided by this Court where local or special legislation, that is to say, legislation applicable alone to the City of St. Louis or to Kansas City, has been held valid. ---- There are cases where this Court has said an act would have been valid applied to St. Louis by name; but this Court has never said this of an act where a general law could have been made applicable, but only in cases where it could not. A local or special law can be passed by the legislature, but this can not be done if the same object can be attained by a general law; and as to whether this can be done is always a judicial question, in investigating which legislative assertion goes for nothing. In other words, and stating the point more briefly the power to enact a local or special law is altogether exceptional and conditional; if the condition exists, to-wit, the inability to make a general law applicable, then the power exists to enact a local or special law. The condition is the basis of the power; absent the condition absent the power". ( 1.)

Although the actual facts of this case, particularly <sup>as to</sup> why the legislature passed the act raising the probate judges' salary, ~~does~~ not appear, the case may be used to illustrate how the constitutional provision giving to the courts the power of finally determining whether or not a general law could have been made applicable, may prevent a certain kind of abuse.







In case the majority of the State Legislature is under the control of a political machine, this provision will give the courts the power to step in and prevent special acts from having legal effect when such acts undertake to provide offices for the more energetic partisans in the larger urban communities, fixing the salaries for such offices considerably higher than is provided by the general laws of the state.

Unfortunately the courts in states where the constitutions have made the question of determining whether or not a general law would be applicable, a judicial one, have shown a marked tendency to extend this provision to cover cases in which a statute can not well be held invalid under the "due process" or "equal protection of the laws" clauses. Under such circumstances the courts in these states have frequently held acts void as special laws where general laws might be made applicable. It seems that in these cases the courts do not consider themselves justified in holding the act void as depriving some person of the equal protection of the laws, so on the ground that the law does not apply to everyone, but only to large classes of individuals, it is held void as being special or local in character.

The extension of this discretion arises from a fundamental question of definition: "What is a special law?" In a sense practically all legislation is special in that it is







designed to correct some particular evil or special abuse and in that it affects specially only those who may, because of the desire on the part of the legislature to correct this abuse, come under its operation. The framers of our state constitutions, however, did not use the term "Special Legislation" in this broad sense, but in a narrower sense in opposition to the term "General or Public Act". In other words the term special legislation means private acts applicable to only one individual or to a few persons in a large class of individuals. Blackstone says that, "A general or public act is a universal rule affecting the entire community or class of the community covered by it. Thus to show the distinction, the statute 13 Eliz. ch.10, to prevent spiritual persons from making leases for longer terms than twenty one years, or their lives, is a public act, being a rule prescribed to the whole body of spiritual persons in the nation; but an act to enable the Bishop of Chester to make a lease to A.B. for sixty years is an exception to this rule; it concerns only the parties and the Bishops successors, and is, therefore a private act." ( 1.)

When the various states adopted constitutional provisions prohibiting local and special legislation, the purpose was to check a very definite evil. In Illinois for example, the Legislature passed in 1869 four large volumes of private and local bills, covering an infinite variety of subjects, <sup>nearly</sup> all capable of being regulated by general laws. A few examples of these local and private acts are: An Act to Incorporate the Illinois







Conference Preacher's Aid Society; ( 1.) An Act to change the name of Georgie ( her other name being unknown ) to Clara Alma Fitch; and make her the heir-at-law of Thomas D. Fitch and Harriet W. Fitch; ( 2.) An act to prohibit gambling and the sale of spirituous liquors within certain boundaries adjacent to Blackburn University, providing fine and imprisonment for a violation of said act; ( 3.) An Act to authorize George Carpenter to raise his mill dam across the Sangamon River. ( 4.)

These examples taken from the private acts of the Illinois Legislature for the year 1869 clearly show the nature of the evil which the Constitutional Convention of that State in 1870 wished to prohibit. The prohibitions on local and special legislation were not intended to be extended so as to supplement the guaranties of the clause assuring all persons the equal protection of the laws. The protection afforded by that clause is, at present at least, sufficient to safeguard private rights. The constitutional conventions in the several states did not intend that the limitations upon local and special legislation should operate so as to prevent the legislatures from passing police measures founded upon a reasonable basis of classification.

Through a loose use on the part of the courts of the term, "Special legislation" the original meaning of it has

Illinois Private Acts 1869. (1.) Vol. I. p. 246, 2. Vol. II 3. Vol. III p. 911, 4. Vol. IV. p. 498.







become obscured in many jurisdictions. Because of judicial dicta and loose definitions of the term, it is possible to find color of authority for holding ~~acts~~ void as special legislation acts which, if objectionable at all should have been attacked under the "equal protection of the laws" clause. This extension of the meaning of the term special legislation to cover a vast field of legislation is naturally most noticeable in those states which have the constitutional provision granting to the Courts the power of determining finally whether or not a general law could have been made applicable in a given case. Yet this extension has not been confined to these states entirely. Although <sup>the</sup> Illinois Constitution does not provide for judicial control in such cases, there are several decisions in this State which indicate the danger of a broad interpretation of the prohibitions against special and local legislation. In a recent case ( 1.) the Court held a statute providing wash-rooms for mines, void, as not being a valid exercise of the State's police power. Furthermore the Court said: "We conclude that the enactment here in question---- is obnoxious to that provision of the fundamental law of the State which forbids special legislation in certain enumerated cases." Curiously enough, the Court failed to indicate the specific prohibition which would cover the case in question. In fact none of the specific prohibitions against local and

1. Starne v. People 222 Ill. 189 ( 1906)

See also: Braceville Coal Co. v. People 147 Ill. 66 (1893)

Jossma v. Foundry Co. 249 Ill. 508.







special legislation can possibly be construed<sup>n</sup> in a way to justify holding the police measure in question, void.

A Missouri case illustrates the broad extension of this provision as supplementary to the equal protection of the laws clause. The defendant was fined for a violation of an act which made it a misdemeanor to carry on the business of barber on Sunday. The Court held that the act violated the provision which forbade special legislation where a general law could have been made applicable. The Court said:

"The fact that laboring on Sunday may be prohibited by proper legislation, as a police regulation, does not place the act beyond or without the inhibition of the Constitution. If the act is valid, then why may not the legislature by one act prohibit the farmer, by another a blacksmith and so on until all kinds of labor on that day are prohibited? Clearly this may be done by a general law embracing all kinds of labor. The object of the Constitution is manifest. It was to prohibit special and local legislation and to substitute general laws in place of it, wherever by a general law the same ends could be accomplished." ( 1.)

In this case it appears that the classification of the legislature was reasonable. The defendant was not singled out and deprived of the equal protection of the laws. The act applied equally to all barbers and it seems as though the







Court in this case seized upon the clause limiting special legislation and giving them the power of determining whether or not a general law could have been made applicable, as a subterfuge.

The tendency on the part of the courts to extend this provision giving them the power of determining whether or not a general law could have been made applicable, thus bringing a large field of legislation within their power of declaring laws void, has been a fruitful source of most confusing litigation in Minnesota. In this state it seems as though the Courts have had little idea just what the provision intends and just what powers it vests in them. In an early case ( 1.) under this clause, the defendant was imprisoned for violating a statute which provided that peddlers and hawkers must be licensed. The act exempted, however, from its operation, manufacturers, mechanics, farmers, butchers and nurserymen. This statute was held void as a special law where a general law could be made applicable. Justice Mitchell dissenting, attempted to correct the misapprehension of the Court in regard to the scope of this provision against special legislation.

"While I concur in the result," he said, "I do not wish to place the decision of the case exclusively upon section 33 Article IV of the Constitution. I am of the opinion that even if these sections had never been adopted, the act in question







would have been invalid as class legislation because repugnant to section 2, Article I of the Constitution, which declares that, ' No member of the State shall be deprived of any of the rights or privileges secured to any other citizen thereof unless by the law of the land'."

Yet even this dissent is not sufficiently vigorous to indicate clearly the danger of interpreting too broadly this provision prohibiting special and local laws where a general act could have been made applicable and giving to the courts the power of finally determining whether or not the special act was necessary.

In a subsequent case a statute forbidding the sale of liquor to any Indian, regardless of his status, was attacked. Justice Mitchell delivering the opinion of the Court, held that this statute was a valid exercise of the State's police power and not contrary to the clause of the Constitution which prohibited a special law where a general law could be made applicable. ( 1.)

Certainly the clause prohibiting a special law where a general law could have been made applicable was not violated by this act. There was neither reason nor necessity for considering the statute in question in the light of this clause. This case presented a golden opportunity for the Court ~~to~~ to declare once and for all that the clause prohibiting special







and local legislation was not intended to be extended so as to supplement the "equal protection of the laws" clause. The Court could have quite properly indicated that if the statute was not objectionable on the ground that it denied some one the equal protection of the laws, the prohibitions against local and special legislation could not and would not be construed so as to hold void police measures founded upon a reasonable basis of classification.

The precedent established by these earlier cases is such that it is now customary for counsel seeking to overthrow a Minnesota statute, to claim that it is a special law where a general law could have been made applicable, when the objection, if well taken, would be that the statute deprives the defendant of the equal protection of the laws. ( 2.)

1. In State ex. rel. Chapel v. Justus ( 1903 ) 90 Minn. 477 an act requiring journeymen plumbers to take an examination and procure a certificate of competency, if they were working in cities of 10,000 or more, having a system of waterworks, was held to be a special law where a general law could have been made applicable, because it distinguished between journeymen and master plumbers.

In State ex. rel. Hoffman v. Justus 91 Minn. 447 an act of 1903 prohibiting the keeping open of butcher shops and other business places on Sunday, while it authorized the sale of confectionary and tobacco was held not a special law where a general law could have been made applicable.

See also: State v. Sherod 80 Minn. 446.







## CONCLUSION.

This clause giving the courts the power to determine finally whether or not a general law could have been made applicable, <sup>if</sup> ~~when~~ strictly construed has and will no doubt continue to check a type of legislation long since considered undesirable if not actually vicious. The clause which provided simply, that the legislature should pass no local or special law where a general law could be made applicable, did not adequately check a considerable field of special legislation, for the reason that the courts interpreted this provision as leaving the question of the necessity for a special law entirely to the discretion and conscience of the legislature. Very frequently the legislature ~~was~~ by abusing this final discretion or <sup>by</sup> ignoring the voice of conscience, passed an act clearly special or local in character, <sup>but</sup> which the courts would not hold void. It is under these conditions that a clause providing for judicial control might well become a valuable safeguard to the public.

The power of the courts to determine whether or not a special law is necessary has been and may well continue to be used to further the aim and intention of the section of enumerated provisions by directing legislation into a uniform channel. The power of the courts to review the action of the legislature in the unenumerated as well as the specific prohibitions will tend to force the legislature to pass acts applicable to all localities upon a reasonable basis of classification. If a certain locality wishes some additional machinery for local administration, it is proper for the legislature to pass an act which will not only assure such machinery





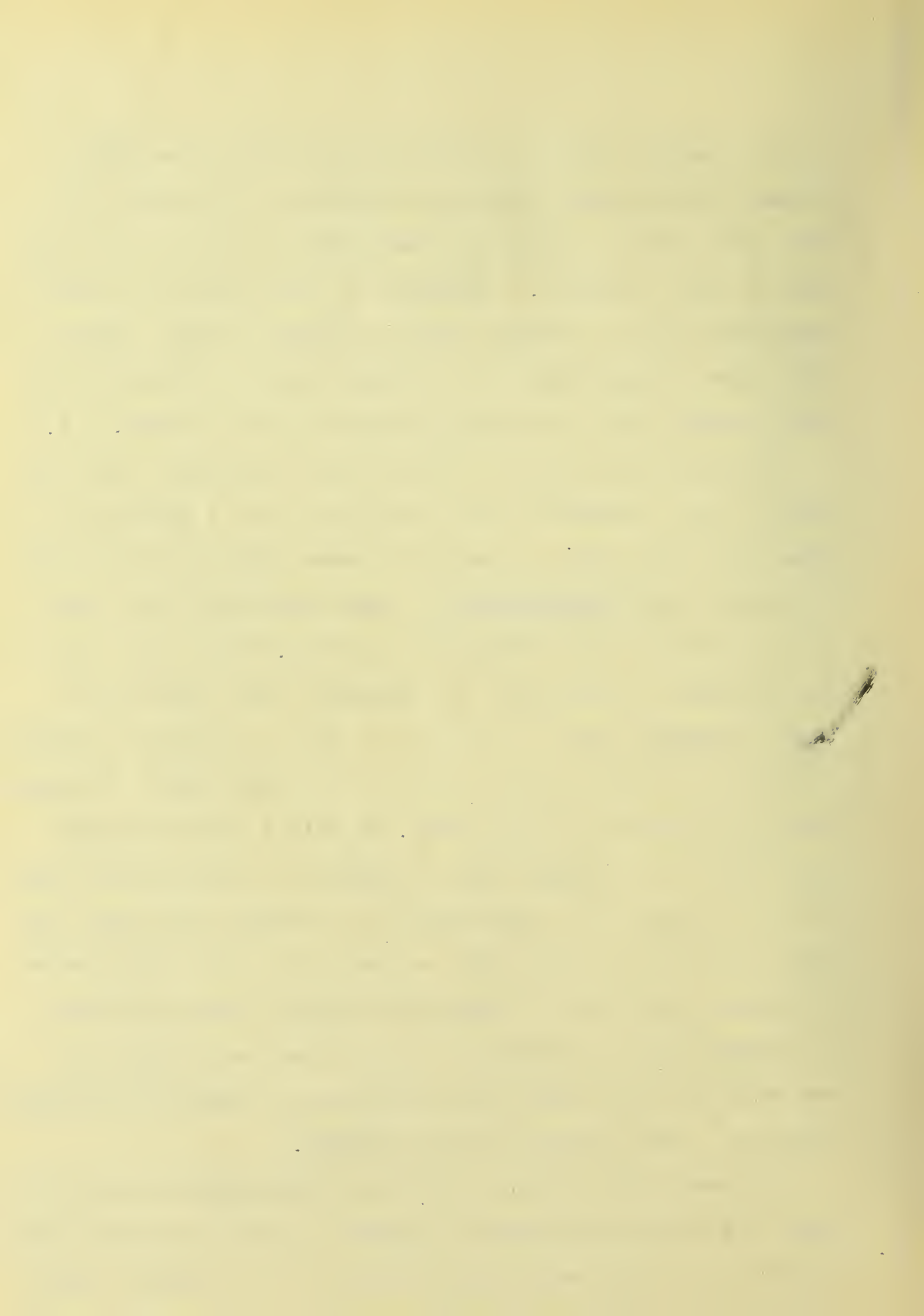


to this locality, but to all other localities in the state having similar local conditions, by making it optional with such localities to accept the provisions of the law or reject them at their pleasure. A tendency of this sort will direct legislation into a broader field of general policy, rather than allow too much time to be wasted over the intricate details arising from the varying needs of each locality. ( 1.)

The chief difficulty with the clause providing that the courts shall determine finally whether or not a general law could have been made applicable has been that the courts fail to confine the application of this provision to the type of legislation it was intended to prevent. This clause was not intended to supplement the safeguard which guarantees that no person shall be deprived of life, liberty or property without due process of law, and that no person shall be denied the equal protection of the laws. To hold a police measure void, when it is founded upon a reasonable classification and can not be said to be objectionable as denying any person the equal protection of the laws, on the ground that such measure is special and local in character because it does not apply to everyone and is therefore a special law where a general one could have been made applicable, is too broad an interpretation of a very definite grant of power.

1. Some states have, by provisions for constitutional home rule for cities, secured a parallel remedy in addition to the remedies which restrictions upon local and special legislation have attempted to provide.







The provisions in the Michigan Constitution of 1908 seem to be the final word in restrictions upon local and special legislation. These provisions appear to anticipate all the difficulties which have arisen in other states over clauses prohibiting special legislation, and to provide localities with a great amount of independence in the control of their governmental machinery as well. No difficulties have yet arisen either because the provision is too elastic or too rigid, and in comparison with the experience of other states the amount of litigation likely to arise is very slight indeed.

In the Michigan Constitution the number of cases in which special or local legislation is prohibited is only five ~~number~~, ( 1.) a marked contrast to the Alabama Constitution which prohibits local and special legislation in thirty three specific cases. The tendency of this small number of specific prohibition is primarily to give great freedom of legislative action. Yet lest this great freedom of action be abused, there is a counter provision prohibiting special or local laws in all cases where a general law could have been made applicable, and it is the province of the courts to determine finally whether or not a general law could have been made applicable. (2.) An additional safeguard is secured by a provision which requires that, "No local or special act shall take effect until approved by a majority of the electors voting thereon in the

1. Mich. Const. 1908 V- 31 to 35.

2. " " " V - 30







district to be affected." ( 1.) Under these safeguards even a beneficial and proper local or special measure has a long and hard road to travel before it finally can become a law. If the legislature passes a vicious local or special measure, the people in the locality to be affected, if the act becomes a law, have an opportunity to defeat it at the polls when it is submitted for their approval. If by any chance the undesirable features of such an act would not become evident until after the people in the locality had accepted it and it had been in actual operation for a time, injured parties would still have an opportunity to attack the act in court as a special law where a general law could have been made applicable. Under such circumstances it might prove very valuable to the public to have a constitutional provision granting to the courts of the state the power of determining ultimately whether or not a general law could have been made applicable.

On the other hand the clause which gives the courts this power of review is not so likely to be abused or even used except in emergencies. Without doubt the courts will be very careful about declaring an act void after the majority of the electors in the locality to be affected have made known their willingness to be under its operation. ( 1.)

The local referrendum on special and local acts provided by the Michigan Constitution is undoubtedly a much more powerful means of arousing public opinion than the provision in







other state constitutions which require the publication of notice of intention to apply for a local or special act. It seems eminently more just that the people to be affected by a local or special act shall have the opportunity not only of speaking against it but also of voting against it and defeating it, if they desire to do so. In the final analysis of the problem it seems very desirable to place the responsibility for the defects as well as for the beneficial results of a local or special act upon the people who are to be affected by it.











UNIVERSITY OF ILLINOIS-URBANA



3 0112 079826993